UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ROSETTA WATSON, | : | |
| Plaintiff, | : | 11 Civ. 9527 (AJN)(HBP) |
| -against- | : | REPORT AND RECOMMENDATION |
| TIMOTHY F. GEITHNER, SECRETARY, DEPARTMENT OF THE TREASURY, | : | |
| Defendant. | : | |

PITMAN, United States Magistrate Judge:

TO THE HONORABLE ALISON J. NATHAN, United States District Judge,

## I. Introduction

This is an employment discrimination action in which plaintiff alleges that she was discriminated against on the basis of her race, age and disability. She also alleges that she has been the victim of illegal retaliation and subjected to disparate treatment. Defendant moves for an Order dismissing the complaint pursuant to 28 U.S.C. § 1915(e)(2)(A) on the ground that plaintiff has falsely claimed poverty in order to be granted leave to proceed in forma pauperis (Docket Item 16). Defendant also moves for an Order granting him summary judgment pursuant to

Fed.R.Civ.P. 56 on the grounds that (1) there is no evidence to establish certain of the elements of a prima facie case and (2) defendant had a non-discriminatory, non-retaliatory reason for the putatively adverse employment action.

For the reasons set forth below, I respectfully recommend that defendant's motion for summary judgment be granted on the grounds that there is no evidence to establish two elements of a prima facie case of discrimination and that plaintiff has failed to rebut the non-retaliatory reason proffered by defendant for the allegedly adverse employment action.

## II. Facts[1]

### A. Background

Plaintiff is an African-American woman, 64 years of age, who has worked for the Internal Revenue Service ("IRS") since February, 1988 (Transcript of Deposition of Rosetta Watson, conducted on July 7 and July 14, 2011, ("Consol. Actions Dep.") at 45,[2] Transcript of Deposition of Rosetta Watson, conducted on

[1]Because I find it unnecessary to address defendant's contention that plaintiff misrepresented her financial status in order to be granted leave to proceed in forma pauperis, I omit all facts concerning that argument.

[2]Plaintiff's deposition in the consolidated actions, i.e., Watson II, Watson III and Watson IV, is properly considered in (continued...)

November 30, 2012, ("Dep. Tr."), annexed as Exhibits 1 and 2, respectively, to the Declaration of AUSA Bertrand Madsen, dated January 22, 2013 (Docket Item 20)). At the time of the events in issue, plaintiff worked as a secretary at the IRS's Wage and Investment Operating Division in Manhattan; among other things, she typed, prepared material for mailing, answered the telephone, ordered supplies and filed taxpayer forms and checks (Dep. Tr. at 6-10; Consol. Action Dep. at 51-52).

During her tenure with the IRS, plaintiff has filed approximately twenty-one complaints with the agency's Equal Employment Opportunity office and has commenced five discrimination actions against the IRS in this Court (Dep. Tr. at 16-17; Watson v. Paulson, 04 Civ. 5909 (VM)(HBP) ("Watson I"); Watson v. Geithner, 09 Civ. 6624 (HBP) ("Watson II"); Watson v. Geithner, 10 Civ. 3948 (HBP) ("Watson III"); Watson v. Geithner, 10 Civ. 7282 (HBP) ("Watson IV"); Watson v. Geither, 11 Civ. 9527 (AJN)(HBP)). The Honorable Victor Marrero, United States Dis-

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[2](...continued)
connection with this motion. Gulf USA Corp. v. Fed. Ins. Co., 259 F.3d 1049, 1056 (9th Cir. 2001); accord Dragon v. I.C. Sys., Inc., 241 F.R.D. 424, 426 n.3 (D. Conn. 2007). I also note that because the depositions in the consolidated actions were taken in July 2011 -- approximately 10 months after the events in issue here -- plaintiff's testimony concerning the motivation for the actions against her necessarily encompassed the events in issue here.

trict Judge, granted the IRS's motion for summary judgment and dismissed the complaint in Watson I. Watson v. Geithner, 578 F. Supp. 2d 554 (S.D.N.Y. 2008), aff'd, 355 F. App'x 482 (2d Cir. 2009). Watson II, Watson III and Watson IV have been consolidated and are assigned to me for all purposes; a motion for summary judgment seeking the dismissal of all three actions is currently pending.

According to plaintiff, the allegedly illegal acts of discrimination and retaliation at issue in this action occurred in October, 2010 (Complaint at 3). Although plaintiff alleges illegal discrimination, at her depositions in both the consolidated actions and in this matter, she has consistently maintained that she has been treated unfairly because her superiors have conspired with attorneys and unidentified third-party "operatives" who are out to retaliate against her as a result of her efforts to bring to light the illegal activities of the attorneys. Specifically, plaintiff claims that the conspiracy resulted from her attempts to expose the fraudulent conduct of two attorneys, one of whom represented her in 1993 in connection with an automobile accident (see Consolidated Actions Dep. at 59). According to plaintiff, after her personal injury action was concluded, the attorney who represented her in that action, Alan S. Ripka, along with another attorney named Seth R. Rotter, "used

[plaintiff's] name and medical records to sue Waldbaums and Wykoff Supermarkets fraudulently in a personal injury case that developed from an actual car accident that occurred while [plaintiff] was a passenger" (Consolidated Actions Dep. at 65). Plaintiff claims that Ripka "used [plaintiff's] name fraudulently to receive a million dollars off the books [and] used [plaintiff's] medical records, [her] name and sued [the] two supermarkets . . ." (Consolidated Actions Dep. at 65). Plaintiff claims that she discovered the alleged fraud in 1996 when she reviewed certain unidentified court records while serving as a juror in New York State Supreme Court, Kings County, in 1995 or 1996 (Consolidated Actions Dep. at 65-66, 70). Plaintiff further claims that she reported Ripka and Rotter's allegedly fraudulent conduct and their failure to pay taxes on their allegedly ill-gotten gain to the IRS, and the IRS retaliated against her for reporting the crime (Consolidated Actions Dep. at 73). According to plaintiff, after she reported the conduct to the IRS, suspicious vehicles started to park outside her house and unknown individuals began to follow her (Consolidated Actions Dep. at 75-77). Plaintiff believes that she continues to be followed (Consolidated Actions Dep. at 79).

Specifically, plaintiff claims that in addition to their own efforts to intimidate her, the lawyers have bribed a

number of IRS employees so that they will not investigate Ripka's wrongdoing and will join in the program to intimidate plaintiff (Consolidated Actions Dep. at 85-86, 90-92, 161, 364-67); she further claims that these activities have continued up to the date of the events giving rise to this action. The conspirators allegedly paid off plaintiff's superior -- Ann Jones-Moffatte -- by buying cars for Jones-Moffatte and her daughter, giving cash to her family members and helping her son get into college -- all in an effort to persuade Jones-Moffatte to participate in the conspiracy to intimidate plaintiff (Dep. Tr. at 38-40). Among other things, plaintiff believes the conspirators have broken into her home and stolen a washing machine, her daughter's medical records, jewelry and clothing and filled her bathtub with cement (Dep. Tr. at 41-43). Plaintiff also believes that the conspirators have bribed Judge Marrero and myself to issue decisions adverse to her (Consolidated Actions Dep. at 111-12).

Plaintiff has repeatedly testified that the participation of her superiors in the alleged conspiracy is the sole motivating factor for the allegedly adverse actions she claims to have suffered. For example, plaintiff testified as follows:

> Q. And your allegation is that those attorneys attempted to use your personal information to initiate another lawsuit unrelated to you?
>
> A. Yes. That was Alan S. Ripka and Seth R. Rotter.

Q. Then you reported that use of your personal information to the IRS?

A. Yes.

Q. And after that, these two attorneys started paying off people at the IRS, apparently paying them not to respond to the allegations you made?

A. I believe that, yes.

Q. And your theory is that in return for the payments they were receiving, folks at the IRS were receiving, they started doing these bad things to you?

A. Yes.

Q. As you sit here today, are you aware of any other reasons, unrelated to these payoffs, why people at the IRS have taken these adverse actions against you?

A. That's the only reason. Because I was in the IRS prior to my being sabotaged and harassed approximately 14 years, and I didn't have that problem. It all began whenever I submitted documentation to TIGTA -- well, they were called "Inspection" then, and that's when the problems began. I was followed, my home was broken into on more than one occasion, items were stolen, items were left.

* * *

Q. Let me ask you one more time. When it comes to Ann Jones-Moffatte, is there any other reason you think she's taking adverse actions against you other than the fact that she's being paid off?

A. I don't believe that she would have taken any adverse reactions against me other than she had an incentive, and the incentive is money, amenities, and she's benefitting. And I've told her that to

her face on more than one occasion and she's never denied it.

(Consolidated Actions Dep. at 364-67 (emphasis added)).

Similarly, with respect to the specific events underlying this action, plaintiff testified:

Q. Ms. Watson, correct me if I'm wrong, you said that Ms. Jones-Moffatte retaliated against you by issuing this letter because of the things she was told to do to bring you down, do you remember that?

A. Or do me in, yeah.

Q. What are you referring to when you say that Ms. Jones-Moffatte was told to do certain things, and by that I mean what was she told, by whom?

A. I believe it was in 2005, she came over to me one day and she told me that Richard Rodriguez, who was at the time the area director, and that she told me that he wanted her to do me in or bring me down, but she said I would never do that because you're a good worker and I have nothing against you. And I think it was a week later she gave me a, it was a letter of, she gave me, she reduced my rating, that's what she did.

Q. And why would Mr. Rodriguez do that?

A. I guess he's as rotten as she is.

Q. Is this part of the conspiracy that you had discussed in your other depositions?

A. Yeah, I mean, I don't know who's directing who to do what. I just know who was carrying it out against me.

* * *

Q. Why would all these individuals, these individuals at the IRS, do these things to you?

> A. Well, they apparently wanted to make sure that they do whatever they were told to do by whomever because somebody in the IRS, and I believe someone higher up and also the outside operatives, the lawyers that I mentioned, were paying people off and giving them amenities. Ann Jones-Moffatte certainly got her share of amenities, and I didn't make any secret of it.

(Dep. Tr. at 36-38).

B. The Bases for the Present Action

The discrimination and retaliation claims in the present action arise out of two "letters of counseling" plaintiff received on October 5 and 14, 2010.

1. The October 5, 2010 Letter of Counseling

During October 2010, plaintiff was supervised by Ann Jones-Moffatte who, like plaintiff, is an African-American woman, over the age of 40 (Dep. Tr. at 14; Declaration of Ann Jones-Moffatte, dated January 17, 2013 (Docket Item 19) ("Jones-Moffatte Decl."), ¶¶ 1-4). The present action is predicated solely on the conduct of Jones-Moffatte (Dep. Tr. at 20).

One of plaintiff's duties as of October 2010 was to review the time sheets of other employees and input their hours worked into the IRS's time-reporting system (Dep. Tr. at 62-63;

Jones-Moffatte Decl. ¶ 6). Prior to September 2010, time was entered on a biweekly basis; in September 2010, the IRS changed procedures to require the inputting of time on a weekly basis (Dep. Tr. at 63; Jones-Moffatte Decl. ¶¶ 8-9). Jones-Moffatte discussed the new weekly reporting requirement during a meeting with employees on September 17, 2010; plaintiff contradicted her at the meeting and told employees that time did not need to be inputted on a weekly basis (Jones-Moffatte Decl. ¶¶ 12-15).

Approximately two weeks later, on September 30, 2010, plaintiff sent Jones-Moffatte an email, asserting that the weekly reporting requirement was not working and identifying several discrepancies she had found in the time records of other employees (Dep. Tr. at 62, 65; Jones-Moffatte Decl. ¶¶ 16-17 & Ex. 1 thereto). In response, Jones-Moffatte spoke with the employees identified by plaintiff and advised each to take corrective action (Jones-Moffatte Decl. ¶ 18). On the following day, plaintiff emailed Jones-Moffatte again, this time requesting that she be credited thirty minutes of time, and Jones-Moffatte met with plaintiff in Jones-Moffatte's office to discuss the matter (Jones-Moffatte Decl. ¶¶ 19-20). While the two were in the office, plaintiff addressed Jones-Moffatte in a loud voice and claimed that Jones-Moffatte was accusing plaintiff of improperly requesting credit for time that plaintiff had not worked (Dep.

Tr. at 65-68; Jones-Moffatte Decl. ¶¶ 21, 24). Jones-Moffatte told plaintiff that she was not accusing plaintiff of falsifying her time, but that it was Jones-Moffatte's responsibility to ensure that the time records were accurate; plaintiff, however, walked out of Jones-Moffatte's office while she was speaking to plaintiff (Jones-Moffatte Decl. ¶¶ 23, 25).[3] Later that day,

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[3]Although, plaintiff's description of the meeting is somewhat different from Jones-Moffatte's, plaintiff makes no claim that Jones-Moffatte made any statement evidencing race-, age- or gender-based animus nor does she make any claim that Jones-Moffatte made any statements suggesting retaliatory animus (see Dep. Tr. at 65-68; Plaintiff's Motion to Deny Defendant's Request for Summary Judgment Motion for a Jury Trial Motion and Request for Permission to Submit a Cassette Tape into Evidence, dated February 25, 2013 (Docket Item 25) ("Plaintiff's Opposition") at 2-4). Accordingly, although there may be issues of fact concerning what went on at the meeting and whether plaintiff did in fact take issue with the amended procedures for reporting time, such issues are not material to the disposition of this motion.

To the extent plaintiff seeks to submit an audio cassette in opposition to the motion for summary judgment, plaintiff does not dispute that she failed to produce that tape in discovery (Plaintiff's Motion to Deny Defendant & Assistant Attorney Bertrand Madsen Request to Deny my Request to Submit a Cassette Tape into Evidence for the Above Case in Opposition to the Defendant's Motion for Summary Judgment, dated March 10, 2013). This is reason alone to preclude reliance on the cassette. Fed.R.Civ.P. 37(c)(1). In any event, based on plaintiff's description of the tape, it appears to bear on whether plaintiff engaged in conduct that warranted the issuance of the counseling memoranda. However, the issue in a discrimination/retaliation case is not whether was a good employee or bad employee. Rather the issue is whether plaintiff suffered an adverse employment action as a result of discriminatory or retaliatory animus. Plaintiff's deposition testimony, quoted above, effectively takes

(continued...)

plaintiff sent an email to Jones-Moffatte in which she wrote, among other things,

> Instead of saying "Thank You" for bringing the errors and discrepancies to your attention you were bel[l]igerent and downright angry. I did not appreciate your response nor your tone of voice regarding this matter. I do not come to work to be treated differently from other employees. You do not have to like me but you must respect me. I was performing my job in the manner that it was suppose[d] to be performed and as a result the errors and discrepancies were things that were of legitimate concern and now have to be corrected and amended. Next time try "Thank You."

(Jones-Moffatte Decl. Ex. 1).

Four days later, on October 5, 2010, Jones-Moffatte issued a counseling memorandum to plaintiff (Jones-Moffatte Decl. ¶ 27 & Ex. 2 thereto). The memo recounted the events of the preceding three weeks and concluded:

> Your behavior towards me, your supervisor, is not acceptable in the workplace and will not be tolerated. Your behavior was in violation of 5 Code of Federal Regulations (CFR) Section 2635.705(a), Performance of Duty, which states, "You are expected to conscientiously perform your duties to the Government and the public, respond readily to the direction of your supervisors, and conduct your relations with fellow employees in a manner which does not cause dissension or discord." Please be advised that further incidents of discourteous conduct and failing to follow my direction, could lead to disciplinary action up to and including removal from the Service.

(Jones-Moffatte Decl. Ex. 2 at 2).

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[3](...continued)
that issue out of the case.

Plaintiff admitted at her deposition that after she received the foregoing letter, she was not fired, her responsibilities did not change, she was not reassigned, her benefits and salary were not affected and she was not subjected to any disciplinary action (Dep. Tr. at 70-71). According to plaintiff, the only identifiable consequence of receiving the foregoing letter was an increase in her blood pressure (Dep. Tr. at 70, 75), although plaintiff offers no medical evidence suggesting causation nor does she attempt to quantify this purported effect. Plaintiff further testified that Jones-Moffatte issued the counseling memo because of her participation in the conspiracy to prevent plaintiff from disclosing illegal activity and because Jones-Moffatte is "a devil" (Dep. Tr. at 69). At her deposition, plaintiff also made the conclusory claim that the memo was issued to discriminate and retaliate against plaintiff (Dep. Tr. at 70), but she has never offered any evidence to support a finding of discriminatory or retaliatory animus.

2. The October 14, 2010 Letter of Counseling

One of the other tasks performed by plaintiff's unit was to send certain forms, including Forms 795 (Daily Report of Collection Activity) and 3210 (Document Transmittal Receipt) to

IRS field offices for processing (Dep. Tr. at 22-23; Jones-Moffatte Decl. ¶ 28). In October 2010, a field office that received these forms was required to acknowledge their receipt to the unit in which plaintiff was employed (Dep. Tr. at 23; Jones-Moffatte Decl. ¶ 29). If an acknowledgment was not received, plaintiff's unit would contact the delinquent field office to follow up (Dep. Tr. at 23-24; Jones-Moffatte Decl. ¶ 29).

Jones-Moffatte met with plaintiff and others on October 4, 2010 to discuss the foregoing matters (Dep. Tr. at 23-24; Jones-Moffatte Decl. ¶ 30). At the meeting, Jones-Moffatte assigned plaintiff the task of following up with those field offices that did not timely acknowledge receipt of the forms (Dep. Tr. at 24-27).

The following day, plaintiff sent an email to Jones-Moffatte, claiming that another employee -- Gail Sussman -- should be assigned the task of following up with the field offices:

> Gail [S]ussman was assigned the duties of contacting the campuses to follow up on the 795/3210 that were not timely received, and I provided her with the number of days the 795s/3210s were delinquent. I am already doing my [s]ecretarial duties and the duties of two full-time Clerks that are no longer in the office as well as the readings of the Xerox Machines on a monthly basis and acting as back-up for Debora Johnson whom [sic] is the IAR. Both the Clerical and IAR positions are out of my Job Series not to mention my medical conditions. Since Gail is acting as your assistant

> with the Clerical/Administrative work she should still continue to follow up with the 795s/3210s not acknowledged timely in order to expedite the receipt of the acknowledgments from the campuses.

(Jones-Moffatte Decl. ¶¶ 31-32 & Ex. 3 thereto).[4]

As a result of plaintiff's email, Jones-Moffatte met with plaintiff on October 8 and 14 to clarify plaintiff's role in following up on Forms 795 and 3210 (Jones-Moffatte Decl. ¶¶ 33-34). In addition, Jones-Moffatte sent plaintiff a second counseling memorandum, stating, among other things:

> I want to remind you again that I have assigned the responsibility of following up on unacknowledged forms 795/3210 to you, not Gail Sussman. I am the manager and I assign the work within the Group. Failing to follow my instructions may result in disciplinary action.
>
> Your behavior as described above is in violation of 5 Code of Federal Regulations (CFR) Section 2635.705(a), Performance of Duty, which states, "You are expected to conscientiously perform your duties to the Government and the public, respond readily to the direction of your supervisors, and conduct your relations with fellow employees in a manner which does not cause dissension or discord."

(Jones-Moffatte Decl. ¶ 35 & Ex. 4 thereto). Again, plaintiff admitted that she suffered no adverse consequences as result of the second counseling memorandum -- her salary, benefits and job

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[4]Notwithstanding her email to Jones-Moffatte, plaintiff testified at her deposition that she was willing to perform the follow-up duties with respect to the forms 795 and 3210 (Dep. Tr. at 26-27, 29). Again, this dispute is not material to the resolution of this motion.

duties did not change (Dep. Tr. at 50-51). Although plaintiff characterized the memorandum as retaliatory, she also claimed that she had done nothing that would warrant retaliation, and that Jones-Moffatte issued the counseling memorandum because "she's a rotten person" and "just to bring [plaintiff] down" (Dep. Tr. at 34-35). Plaintiff also claimed that Jones-Moffatte issued the counseling memo due to her participation in the alleged conspiracy discussed above (Dep. Tr. at 36-38).

## III. Analysis

### A. Summary Judgment Standards

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

> Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party . . . is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, a court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To grant the motion, the court must determine that there is no genuine issue of material fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine factual issue derives from the "evidence [being] such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248, 106 S.Ct. 2505. The nonmoving party cannot defeat summary judgment by "simply show[ing] that there is some metaphysical doubt as to the material facts," Matsushita Elec.

> Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), or by a factual argument based on "conjecture or surmise," Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). The Supreme Court teaches that "all that is required [from a nonmoving party] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); see also Hunt v. Cromartie, 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). It is a settled rule that "[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997).

McClellan v. Smith, 439 F.3d 137, 144 (2d Cir. 2006); accord Hill v. Curcione, 657 F.3d 116, 124 (2d Cir. 2011); Jeffreys v. City of New York, 426 F.3d 549, 553-54 (2d Cir. 2005); Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004).

"Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Coppola v. Bear Stearns & Co., Inc., 499 F.3d 144, 148 (2d Cir. 2007), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); accord McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007). "'[I]n ruling on a motion for summary judgment, a judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could

return a verdict for the [non-movant] on the evidence presented[.]'" Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 788 (2d Cir. 2007), quoting Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 298 (2d Cir. 1996).

Summary judgment is "ordinarily inappropriate" in employment discrimination cases where the employer's intent and state of mind are in dispute. Carlton v. Mystic Transp., Inc., 202 F.3d 129, 134 (2d Cir. 2000); Cifarelli v. Vill. of Babylon, 93 F.3d 47, 54 (2d Cir. 1996); see Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994); Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985). Moreover, in discrimination cases,

> summary judgment may not be granted simply because the court believes that the plaintiff will be unable to meet his or her burden of persuasion at trial . . . . There must either be a lack of evidence in support of the plaintiff's position, . . . or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error.

Danzer v. Norden Sys., Inc., 151 F.3d 50, 54 (2d Cir. 1998) (footnote and citations omitted). See Risco v. McHugh, 868 F. Supp. 2d 75, 98 (S.D.N.Y. 2012) (Ramos, D.J.).

> When deciding whether summary judgment should be granted in a discrimination case, we must take additional considerations into account. Gallo v. Prudential Residential Services, 22 F.3d 1219, 1224 (2d Cir. 1994). "A trial court must be cautious about granting

> summary judgment to an employer when, as here, its intent is at issue." Id. "[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." Id. Summary judgment remains appropriate in discrimination cases, as "the salutary purposes of summary judgment -- avoiding protracted, expensive and harassing trials -- apply no less to discrimination cases than to . . . other areas of litigation." Weinstock, 224 F.3d at 41 (internal quotation marks omitted); see also Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir. 2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases.").

Desir v. City of New York, 453 F. App'x 30, 33 (2d Cir. 2011)(alterations in original).

B. Application of the Foregoing Principles

Claims of discrimination on the basis of race, age and disability are properly analyzed under the now familiar framework first set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). E.g., Men of Color Helping All Soc., Inc. v. City of Buffalo, Docket No. No. 12-3067-CV, 2013 WL 3285208 at *3 (2d Cir. July 1, 2013) (race discrimination); Ben-Levy v. Bloomberg, L.P., Docket No. No. 12-2795-cv, 2013 WL 1810953 at *1 (2d Cir. May 1, 2013) (age and disability discrimination); McMillan v. City of New York, 711 F.3d 120, 125 (2d Cir. 2013) (disability discrimination); Rubinow v. Boehringer Ingelheim

Pharm., Inc., 496 F. App'x 117, 118 (2d Cir. 2012) (age discrimination).

Under the McDonnell Douglas framework, plaintiff's claims are assessed through a three-part, burden-shifting analysis:

> [T]he initial burden rests with the plaintiff to establish a prima facie case of discrimination. "A plaintiff's establishment of a prima facie case gives rise to a presumption of unlawful discrimination" that then "shifts the burden of production to the defendant, who must proffer a 'legitimate, nondiscriminatory reason' for the challenged employment action." Woodman v. WWOR-TV, Inc., 411 F.3d [69, 76 (2d Cir. 2005)] (quoting Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 91 (2d Cir. 2001)). If the defendant satisfies this burden, "the presumption of discrimination drops out" of the case, and the plaintiff must prove that a defendant's proffered reasons were not the true reasons for its actions but a pretext for discrimination. Roge v. NYP Holdings, Inc., 257 F.3d 164, 168 (2d Cir. 2001).

Cross v. New York City Transit Auth., 417 F.3d 241, 248 (2d Cir. 2005).

In order to meet her burden with respect to a prima facie case of discrimination, plaintiff must offer evidence sufficient to give rise to an issue of fact as to four elements: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action and (4) the adverse employment action occurred in circumstances giving rise to an inference of discrimination on the basis of her membership in a protected class. Dawson v. Bumble &

Bumble, 398 F.3d 211, 216 (2d Cir. 2005); Collins v. N.Y.C. Transit Auth., 305 F.3d 113, 118 (2d Cir. 2002); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999); Brennan v. Metro. Opera Ass'n Inc., 192 F.3d 310, 316 (2d Cir. 1999); Hills v. City of New York, 03 Civ. 4265 (WHP), 2005 WL 591130 at *3 (S.D.N.Y. Mar. 15, 2005) (Pauley, D.J.); Beckmann v. Darden, 351 F. Supp. 2d 139, 146 (S.D.N.Y. 2004) (Robinson, D.J.); Williams v. Salvation Army, 108 F. Supp. 2d 303, 308 (S.D.N.Y. 2000) (Berman, D.J.), citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

A retaliation claim is subject to the same burden-shifting analysis except that the elements of a prima facie case are slightly different. Kaytor v. Electric Boat Corp., 609 F.3d 537, 552 (2d Cir. 2010); Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005). To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) she engaged in protected activity; (2) the employer was aware of this activity; (3) the employer took adverse action against her and (4) a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action. Obinabo V. Radioshack Corp., Docket No. 12-2476, 2013 WL 2450544 at *1 (2d Cir. June 7, 2013); Rivera v. Rochester Genesee Reg'l Transp. Auth., 702 F.3d 685,

698 (2d Cir. 2012); Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 177 (2d Cir. 2006); Constance v. Pepsi Bottling Co. of N.Y., 03-CV-5009 (CBA)(MDG), 2007 WL 2460688 at *34 (E.D.N.Y. Aug. 24, 2007). "The term 'protected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000); see also Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006) ("Title VII's antiretaliation provision forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing.'" (quoting 42 U.S.C. § 2000e-3(a))).

1. Plaintiff's Discrimination Claim

Defendant does not take issue with plaintiff's ability to meet the first two requirements of a prima facie case of discrimination. See Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001) ("To show 'qualification' . . . the plaintiff need not show perfect performance or even average performance. Instead, [she] need only make the minimal showing that [she] possesses the basic skills necessary for performance of the job." (inner quotations and citations omitted; emphasis in original)). Defendant does,

however, contend that there is no evidence that plaintiff suffered an adverse employment action or that the purportedly adverse employment actions occurred under circumstances that give rise to an inference of discrimination.

a. Adverse Employment Action

An adverse employment action requires a materially adverse change in the terms and conditions of employment.

> A plaintiff sustains an adverse employment action if he or she endures a "materially adverse change" in the terms and conditions of employment. See Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426, 446 (2d Cir. 1999) (relying on Crady v. Liberty Nat'l Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)). To be "materially adverse" a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Crady, 993 F.2d at 136. "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." Id.; see Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997) (ADEA protects the employee against "less flagrant reprisals" than termination or a reduction in wages and benefits).

Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (footnote omitted); accord Sanders v. New York City Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004); Terry v. Ashcroft, 336 F.3d 128, 138, 141 (2d Cir. 2003).

The only putatively adverse employment actions cited by plaintiff are the two counseling memos issued by Jones-Moffatte. The cases in this Circuit uniformly hold that the issuance of such memoranda, unaccompanied by demotion, diminution of responsibilities or the like, does not constitute an adverse employment action for purposes of a discrimination claim. Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 570 (2d Cir. 2011) ("[E]ven assuming the counseling rose to the level of some form of criticism, we have held, in the context of the issuance of a 'counseling memo,' that criticism of an employee (which is part of training and necessary to allow employees to develop, improve and avoid discipline) is not an adverse employment action." (inner quotations omitted)); Cody v. Cnty. of Nassau, 345 F. App'x 717, 719 (2d Cir. 2009) (counseling notices not adverse employment actions); Williams v. New York City Housing Auth., 335 F. App'x 108, 110 (2d Cir. 2009) (issuance of two counseling memoranda not adverse employment action); Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (employee counseling session not adverse employment action); Weeks v. New York State Div. of Parole, 273 F.3d 76, 86 (2d Cir. 2001) (a notice informing an employee of incompetence and a "counseling memo" concerning the employee's conduct, in the absence of any allegation of negative effects on plaintiff's job conditions could not consti-

tute an adverse employment action), abrogated on other grounds, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 108-14 (2002); Hussey v. New York State Dept. of Law/Office of Atty. Gen., 11-CV-0206 (RRM)(RLM), 2013 WL 1170719 at *9 (E.D.N.Y. Mar. 20, 2013) ("As a matter of law, a counseling memo does not constitute a materially adverse employment action unless it is accompanied by other adverse changes in employment."); Durant v. New York City Housing Auth., 12-CV-937 (NGG)(JMA), 2013 WL 1232501 at *6 (E.D.N.Y. Mar. 4, 2013) (Report & Recommendation) ("[T]he November 1, 2011 counseling memorandum that plaintiff received is not, by itself, an adverse action."), adopted at, 2013 WL 1247516 (E.D.N.Y. Mar 26, 2013); Lyman v. NYS OASAS, 1:12-CV-530 (MAD/RFT), 2013 WL 705119 at *7 (N.D.N.Y. Feb. 26, 2013) ("[T]he issuance of a 'counseling memorandum' and a 'notice of discipline,' without any further evidence regarding a materially adverse effect thereof, is not an adverse employment action as a matter of law."); Risco v. McHugh, 868 F. Supp. 2d 75, 113 (S.D.N.Y. 2012) (Ramos, D.J.) ("The preparation of two counseling memoranda . . . is insufficient to establish a materially adverse action as a matter of law."); Sotomayor v. City of New York, 862 F. Supp. 2d 226, 254 (E.D.N.Y. 2012) (Weinstein, D.J.) ("Criticism of an employee in the course of evaluating and correcting

her work is not an adverse employment action."); Sheridan v. New York Life Inv. Management, LLC, 09 Civ. 4746 (KBF), 2012 WL 474035 at *6 (S.D.N.Y. Feb. 9, 2012) (Forrest, D.J.) ("[A]s a matter of fact and law, the [Memorandum of Understanding placed in plaintiff's file setting forth performance deficiencies] cannot itself be an adverse employment action.").

Plaintiff offers no evidence that even remotely suggests she suffered any adverse actions beyond the receipt of the memos themselves, and she freely admitted at her deposition that there was no change in her duties or compensation after the receipt of either counseling memo (Dep. Tr. at 50-51, 70-71).[5] Thus, the authorities cited in the preceding paragraph mandate the conclusion that an essential element of plaintiff's prima facie case of discrimination -- an adverse employment action -- is lacking.

[5]To the extent plaintiff makes the conclusory assertion that her hypertension was exacerbated as a result of the memos, her subjective conclusion, unaided by any medical evidence of causation, is inadmissible. In any event, plaintiff's hypertension, whatever its cause, is not a change in the conditions of employment.

b. An Adverse Employment Action Occurring Under Circumstances that Give Rise to an Inference of Discrimination

Even if I assume that the issuance of counseling memoranda constitutes an adverse employment action, there is no evidence that they were issued under circumstances giving rise to an inference of discrimination.

Although there can be no doubt that workplace discrimination is often subtle and that individuals who engage in discrimination rarely expressly state their illegal motivation, a plaintiff alleging illegal discrimination must offer more than a subjective belief that she has been the victim of illegal discrimination. A plaintiff's "belief, based on no evidence other than gut instinct that [her supervisor] treated her with hostility because of her race, cannot justifiably support an inference of discrimination when nothing in the record remotely links [the supervisor's] treatment of [plaintiff] to her race." Taylor v. Polygram Records, 94 Civ. 7689 (CSH), 1999 WL 124456 at *16 (S.D.N.Y. Mar. 8, 1999) (Haight, D.J.) (emphasis in original); accord Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991) (summary judgment motion cannot be defeated "on the basis of conjecture or surmise"); Lioi v. New York City Dep't of Health & Mental Hygiene, 914 F. Supp. 2d 567, 583 (S.D.N.Y. 2012)

(Engelmayer, D.J.) ("[A] plaintiff cannot establish a prima facie case based on 'purely conclusory allegations of discrimination, absent any concrete particulars.'" (internal citations omitted)); Shabat v. Blue Cross Blue Shield, 925 F. Supp. 977, 988 (W.D.N.Y. 1996) ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate non-discriminatory reason." (internal citations omitted)).

Plaintiff has offered no admissible evidence suggesting that the putatively adverse employment actions occurred under circumstances that would support an inference of discrimination. First, plaintiff affirmatively testified that Jones-Moffatte issued the counseling memoranda as a result of her participation in the conspiracy to intimidate plaintiff (Dep. Tr. at 36-41, 45, 70). Second, plaintiff testified that Jones-Moffatte issued the memoranda because "she's a rotten person" and "she's "a devil" (Dep. Tr. at 34, 69). Third, to the extent plaintiff testified that Jones-Moffatte issued the memoranda for discriminatory reasons (Dep. Tr. at 46, 48, 50), her testimony was entirely conclusory and unsupported by any evidence of facts that could support an inference of discrimination.

The only arguably admissible evidence in the record that might support an inference of discrimination is plaintiff's testimony that she was treated less favorably than certain other individuals (Dep. Tr. at 53-58).

> "A showing of disparate treatment -- that is, a showing that an employer treated plaintiff 'less favorably than a similarly situated employee outside his protected group' -- is a recognized method of raising an inference of discrimination for the purposes of making out a prima facie case." Mandell v. County of Suffolk, 316 F.3d 368, 379 (2d Cir. 2003). An employee is similarly situated to co-employees if they were (1) "subject to the same performance evaluation and discipline standards" and (2) "engaged in comparable conduct." Graham v. Long Island R.R., 230 F.3d 34, 40 (2d Cir. 2000). "[T]he standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical." Id. In other words, the comparator must be similarly situated to the plaintiff "in all material respects." Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997).

Ruiz v. Cnty. of Rockland, 609 F.3d 486, 493-94 (2d Cir. 2010); accord Zuk v. Onondaga Cnty., 471 F. App'x 70, 71 (2d Cir. 2012). The plaintiff bears the burden of demonstrating that a putative comparator is similarly situated in all material respects. Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) ("When considering whether a plaintiff has raised an inference of discrimination by showing that she was subjected to disparate treatment, we have said that the plaintiff must show she was similarly situated in all material respects to the individuals with whom

she seeks to compare herself.") (internal quotations omitted); accord Bennett v. Verizon Wireless, 04-CV-6314 (CJS), 2008 WL 216073 at *2 (W.D.N.Y. Jan. 24, 2008); White v. Home Depot Inc., 04-CV-401, 2008 WL 189865 at *6 (E.D.N.Y. Jan. 17, 2008); Augustin v. Yale Club, 03 Civ. 1924 (KMK), 2006 WL 2690289 at *25 (S.D.N.Y. Sept. 15, 2006) (Karas, D.J.); Conway v. Microsoft Corp., 414 F. Supp. 2d 450, 459 (S.D.N.Y. 2006) (Holwell, D.J.). Whether employees are similarly situated is ordinarily a question of fact; however, "if there are many distinguishing factors between plaintiff and the comparators, the court may conclude as a matter of law that they are not similarly situated." Nurse v. Lutheran Med. Ctr., 854 F. Supp. 2d 300, 312 (E.D.N.Y. 2012), citing McGuinness v. Lincoln Hall, 263 F.3d 49, 54 (2d Cir. 2001) and Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 n. 2 (2d Cir. 2001).

Plaintiff testified concerning four putative comparators: Gail Sussman, Charise Hart, Margaret Cummings-McEacheron, and Patrice Howard (Dep. Tr. at 53, 55, 57, 59). All of the putative comparators, however, had pay grades higher than plaintiff's (Dep. Tr. at 53-59) and none had engaged in conduct similar to the conduct cited by Jones-Moffatte in the counseling memoranda, i.e., disobeying the directions of a supervisor. Given these differences, especially the latter, these four indi-

viduals are not similarly situated to plaintiff, and, thus, even if they were treated differently than plaintiff, such differences cannot provide a basis for an inference of discrimination.

c. Summary

Accordingly, plaintiff has failed to offer any evidence that would support a finding as to two of the essential elements of a prima facie case, namely, an adverse employment action and facts giving rise to an inference of discrimination. Defendant is, therefore entitled to summary judgment with respect to plaintiff's discrimination claims.

2. Retaliation Claim

Assuming for purposes of argument that plaintiff can discharge her burden of establishing a prima facie case of retaliation, defendant is also entitled to summary judgment on this claim because plaintiff has not discharged her burden of offering evidence sufficient to support a finding that the non-retaliatory reason proffered by defendant is really a pretext for retaliation.[6]

[6]Although the record appears to establish other potential bases for granting defendant summary judgment on plaintiff's retaliation claim, defendant does not rely on these other grounds (continued...)

Defendant states that the counseling memoranda were issued to plaintiff as a result of her inappropriate behavior with respect her supervisor's instructions to her (Jones-Moffatte Decl. ¶¶ 14, 21-22, 24-27, 31-32, 34, 35, 37 & Exs. 1-4 thereto). Plaintiff not only offers nothing in response to this contention, but she also affirmatively stated at her deposition that the counseling memoranda were issued in retaliation for her efforts

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[6](...continued)
for summary judgment. For example, plaintiff claimed at her deposition that the basis for Jones-Moffatte's allegedly retaliatory conduct was her participation in the alleged conspiracy to intimidate plaintiff (Dep. Tr. at 35-37); plaintiff never even suggested that she was the victim of retaliation based on her participation in protected activity. In his memorandum of law, however, defendant does not assert the lack of a connection between protected activity and the allegedly adverse employment action as a basis for granting summary judgment. In light of plaintiff's pro se status, it would be inappropriate to grant summary judgment on the basis of theories the movant never asserted.

I also note that although defendant argues that he is entitled to summary judgment dismissing the retaliation claim because plaintiff has not suffered an adverse employment action, defendant does not address the Supreme Court's holding that an adverse employment action for purposes of a retaliation claim is a broader concept than for purposes of a direct discrimination claim. See Burlington Northern & Santa Fe Ry. v. White, supra, 548 U.S. at 57; Hicks v. Baines, 593 F.3d 159, 165 (2d Cir. 2010) (for purposes of a retaliation claim, "[a]ctions are 'materially adverse' if they are 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" (internal citation omitted)). Because defendant does not cite any post-Burlington authority holding, as a matter of law, that a counseling memorandum is not an adverse employment action for purposes of a retaliation claim, I decline to recommend summary judgment on this ground.

to disclose the allegedly illegal activity of attorneys Ripka and Rotter (Dep. Tr. at 34-37), not in retaliation for her participating in any protected activity.[7] Even if I assume that there is sufficient temporal proximity between plaintiff's EEO complaints and civil actions and the issuance of the counseling memoranda to support an inference of retaliation at the prima facie stage,[8] temporal proximity alone is insufficient to show that a non-retaliatory reason for the adverse employment action is a pretext for illegal retaliation. El Sayed v. Hilton Hotels Corp., 627

[7]In her opposition papers, plaintiff makes the conclusory statement her employer did retaliate against her for EEO complaints and her discrimination actions (Plaintiffs Opposition at 1, 4). In addition to be entirely conculsory, these statements contradict plaintiff's sworn deposition testimony. They are, therefore, insufficient to create a genuine issue of fact. In re Fosamax Products Liability Litig., 707 F.3d 189, 193-94 (2d Cir. 2013) (The "sham issue of fact" doctrine "prohibits a party from defeating summary judgment simply by submitting an affidavit that contradicts the party's previous sworn testimony."); Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987) ("It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment.").

[8]Although plaintiff did not identify it as a cause for the allegedly retaliatory conduct, I note that the complaint in Watson IV was filed on September 22, 2010, two to three weeks before the allegedly retaliatory counseling memoranda. This degree of temporal proximity is sufficient to sustain an inference of retaliatory animus at the first step of the McDonnell Douglas analysis. See Nagle v. Marron, 663 F.3d 100, 110-11 (2d Cir. 2011) (six-week span between protected activity and adverse action sufficient to sustain inference of causation at the prima facie stage).

F.3d 931, 933 (2d Cir. 2010) (per curiam) ("The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext. . . . Indeed, a plaintiff must come forward with some evidence of pretext in order to raise a triable issue of fact."), citing Quinn v. Green Tree Credit Corp., 159 F.3d 759, 770 (2d Cir. 1998); Dixon v. Int'l Fed'n of Accountants, 416 F. App'x 107, 110-11 (2d Cir. 2011). The absence of evidence of retaliatory animus other than temporal proximity in conjunction with plaintiff's admission that protected activity was not a reason for the allegedly retaliatory acts is fatal to plaintiff's retaliation claim.

Summary judgment should, therefore, also be granted with respect to plaintiff's retaliation claim.

## IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that summary judgment be granted dismissing the complaint in its entirety.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Alison J. Nathan, United States District Judge, 40 Centre Street, Room 2102, and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Nathan. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair

Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-238 (2d Cir. 1983).

Dated: New York, New York
August 8, 2013

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

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